

28 USC §586(e)
5 USC §701 et seq
11 USC §326(b)
28 USC §1334(b)
28 USC §157(b)

In re Robert W. Myers, Trustee

Misc No. 92-303-H

11-13-92

The standing chapter 13 trustee for Portland, Robert W. Myers, was sued in U.S. District Court (Portland) by a former employee of the chapter 13 office for alleged age discrimination. Myers denied the allegations and incurred legal fees and other costs in defending the claim. Myers sought permission from the US Trustee's office to treat these expenses as part of his "actual, necessary" office expenses under 28 USC §586(e)(2). The US Trustee's office did not investigate whether the allegations against Myers were true. The US Trustee's office refused Myers's request on the ground that such expenses should not be approved since to do so would encourage discrimination.

Myers filed a motion with the bankruptcy court to determine whether the litigation expenses were "actual, necessary" expenses. After the motion was filed by Myers, the US District Court dismissed the former employee's complaint for failure to state a claim.

The court held that it had jurisdiction under the Ninth Circuit's broad interpretation of 28 USC §1334 ("related to cases under title 11"). The court also held that this was a core matter under 28 USC §157(b) and that 11 USC §326(b) did not apply.

The court held that 28 USC §586(e)(2) does not authorize the US Trustee's office to set "actual, necessary" expenses for standing chapter 13 trustees as asserted by the US Trustee. Rather, this was left to courts to decide in the event of a dispute, as in this case. The court ruled that, by analogy to corporate indemnification and tax law, and based on policy and equitable considerations, such litigation defenses are "actual, necessary" expenses under 28 USC §586(e)(2) where the trustee prevails in the litigation.

The court also held that the Administrative Procedures Act applied to regulate the US Trustee's office. Under the APA, even if the determination at issue were delegated to the agency, the court would set aside its action as "arbitrary and capricious." The decision was arbitrary and capricious in that the reasons given for refusing Myers's request were not logical and were based on the erroneous assumption that Myers acted unlawfully. Thus, the court ruled that Myers should submit a list of the actual expenses to the US Trustee for review and

objection based on a reasonableness standard. Absent objection, the court indicated it would enter an order approving payment of the expenses from trust funds.

P92-22(40) + exhibits

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9 UNITED STATES BANKRUPTCY COURT
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11 FOR THE DISTRICT OF OREGON
12

13
14 In Re)
15) Misc. #92-303-H
16 ROBERT W. MYERS, TRUSTEE)
17) OPINION
18)
19

20 This matter came before the court upon the motion of the
21 standing chapter 13 trustee in Portland, Oregon, Robert W.
22 Myers ("Myers"). Myers is represented by Paul Cosgrove of
23 Portland, Oregon. The motion seeks an order of the court
24 authorizing Myers to pay certain legal defense costs as
25 "actual, necessary expenses incurred by such individual as
26 standing trustee in such cases." 28 U.S.C.
27 §586(e)(2)(B)(ii). The motion is opposed by the Executive
28 Office for United States Trustees ("EOUST") which is
29 represented by the local Assistant United States Trustee
30 ("AUST"), Pamela Griffith.

1 **FINDINGS OF FACT:**

2 Myers was sued by a former employee who worked in his
3 chapter 13 office. The former employee alleged certain
4 violations of the federal Age Discrimination in Employment
5 Act. Myers denied the allegations and hired counsel to
6 defend the lawsuit. Myers sought permission from the EOUST
7 to pay the defense costs as part of the expenses of his
8 chapter 13 office. The EOUST, in a letter dated July 20,
9 1992 written by Martha Davis, General Counsel to the Director
10 of the EOUST, refused to allow such payment. In the July 20
11 letter, the EOUST referred to and relied upon a memorandum
12 from the EOUST, also written by Ms. Davis, to all United
13 States Trustees dated July 10, 1992 which discussed whether
14 "an award for damages for employment discrimination, as well
15 as the attorney fees associated with defending such a
16 lawsuit, may be paid from trust funds held by a standing
17 chapter 13 trustee." (footnote omitted.) Both the July 20,
18 1992 letter and the July 10, 1992 memorandum are attached to
19 this opinion as exhibits #1 and #2, respectively.

20 After a hearing on the motion, an amended motion was
21 filed that seeks permission to pay the legal expenses from
22 funds received during the years in which the expenses were
23 incurred. No objections to the procedural posture or form of
24 the proceedings have been raised by either party and the

1 court will consider any such objections as having been
2 waived.

3 The parties stipulate that Myers's standard liability
4 insurance policy does not cover the former employee's claim
5 or the defense costs associated therewith.

6 Myers argued that the former employee's lawsuit is
7 frivolous and that the defense costs are similar to all the
8 other costs of conducting the business of running the chapter
9 13 office, which costs are routinely approved by the EOUST.

10
11 The AUST admitted at one of the hearings that:

12 "I think everybody would like to believe that [the
13 lawsuit] is frivolous in this case, and perhaps it
14 is. I have no reason to think it isn't. But we
15 don't know that. And the fact of the matter is
16 that most lawsuits of this nature are going to be
17 settled before they go to a full-blown trial, and
18 we would have no way of knowing whether it's really
19 frivolous or really not frivolous." Transcript of
20 Hearing held September 10, 1992, pp. 15-16, lines
21 24-25 and 1-6.

22 Thus, it appears the EOUST has conducted no investigation
23 to determine whether Myers engaged in unlawful conduct.
24 Based on the EOUST's position that Myers's actual conduct is
25 irrelevant, it appears that neither the EOUST nor the AUST
26 intend to conduct any investigation into the former
27 employee's allegations.¹

¹ Obviously, the AUST's statement that she has no way of knowing whether the lawsuit is frivolous is incorrect. The

1 Despite the AUST's apparent belief that the former
2 employee's lawsuit would be settled, the complaint has now
3 been dismissed by the U.S. District Court for failure to
4 state a claim for relief. Thus, not only did the former
5 employee not prevail in her allegations, the court ruled that
6 she was unable to allege, let alone prove, that Myers had
7 violated the law.

AUST could have investigated the allegations against Myers to determine their accuracy.

The AUST's lack of concern over the accuracy of the former employee's allegations is troublesome to the court. One of the functions of the U.S. Trustee is to "perform the supervisory and appointing functions now handled by the bankruptcy judges, and to monitor trustee performance in more detail than is now practicable." H.R. Rep. 595, 95th Cong., 1st Sess. 101 (1977).

The AUST's failure to investigate the allegations against Myers is partly due, no doubt, to the EOUST's policy that the costs of defending such allegations are never considered necessary expenses. Based on this policy, the AUST apparently feels such an investigation is pointless. This attitude, however, demonstrates what this court perceives as a common failing in the AUST's office in carrying out its Congressional mandate to monitor trustees' activities.

This court's experience is that Myers is extremely competent. For example, Myers's commission for chapter 13 payments is currently less than 5% while other similarly-situated offices charge 10%. The lower the trustee's charges the greater the dividends to unsecured creditors. Myers's commission has never exceeded 5% and at times has been as low as 3.5%. The low commission is directly due to Myers's constant efforts to increase efficiency and lower costs. It is unfortunate that one of the most efficient standing trustee operations in the country is apparently not recognized as such by the supervising agency. Rather than investigate the truth of the charges made against this obviously competent and valuable standing trustee, the AUST and EOUST are content to assume that Myers violated the law and therefore refuse to allow reimbursement of the expenses in question.

1 **CONCLUSIONS OF LAW**

2 1. Jurisdiction under 28 U.S.C. §1334

3 The AUST's first argument is that this court has no
4 subject matter jurisdiction. The bankruptcy court's subject
5 matter jurisdiction derives from 28 U.S.C. §1334(b) which
6 states, in relevant part:

7 [T]he district courts shall have original
8 but not exclusive jurisdiction of all
9 civil proceedings arising under title 11,
10 or arising in or related to cases under
11 title 11.

12 The EOUST argues that the U.S. District Court would not have
13 jurisdiction over this matter since it does not arise under
14 title 11 or relate to cases under title 11. Based on this
15 argument, the EOUST asserts that the Bankruptcy Court does
16 not have jurisdiction.²

17 The Ninth Circuit Court of Appeals has ruled that §1334's
18 reference to "related to" jurisdiction should be given as
19 broad a scope as possible to allow the bankruptcy courts to

2 It should be noted that the U.S. District
Court would have jurisdiction under 28 U.S.C.
§1331 which provides:

 The district courts shall have
original jurisdiction of all civil
actions arising under the
Constitution, laws or treaties of the
United States.

Thus, if this matter had been brought in the U.S.
District Court, it would be unnecessary to
analyze 28 U.S.C. §1334, which deals with
bankruptcy.

1 carry out the purposes of the Code. In re Fietz, 852 F.2d
2 455, 457 (9th Cir. 1988). The AUST admits that the outcome
3 of Myers's motion could affect individual cases:

4 It is true that the outcome of disputes
5 concerning reimbursable expenses could
6 conceivably affect the administrative
7 costs of chapter 13 cases and, therefore,
8 the percentage fees that are collected
9 from payments under confirmed plans.
10 Memorandum of Law in Support of United
11 States Trustee's Response in Opposition
12 to Motion for Order Allowing Trustee to
13 Retain Surplus Funds and to Pay Costs of
14 Trustee's Defense (Hereafter "AUST's
15 Memo"), p.5, lines 1-5.

16 The court agrees that the outcome of this case could affect
17 individual cases. Thus, the court concludes that the
18 district court has jurisdiction under 28 U.S.C. §1334. By
19 virtue of 28 U.S.C. §157(a) and Local Rule 2101-1, the U.S.
20 District Court has referred this proceeding to this court.

21 The EOUST has not argued that this is not a core
22 proceeding under 28 U.S.C. §157(b). Pursuant to 28 U.S.C.
23 §157(b)(3), however, the court must make this determination
24 on its own motion. Under 28 U.S.C. §157(b)(2)(A), "core"
25 proceedings include "matters concerning the administration of
26 the estate." The present issue directly affects the
27 administration of estates, as previously mentioned. Whether
28 §157(b)(2)(A) was intended to apply in this context is
29 uncertain. However, as will be discussed next, Congressional

1 intent indicates that the bankruptcy court was not intended
2 to be removed from determinations such as these. Thus, the
3 court concludes this is a core matter under §157(b)(2)(A).

4 2. The Bankruptcy Court's Authority under 11 U.S.C. §326(b)

5 The EOUST argues that the court has no authority to grant
6 the motion under 11 U.S.C. §326(b). In her memorandum of
7 law, the AUST argues:

8 Section 326(b) of the Bankruptcy Code
9 states that "the court may not allow
10 compensation for services or
11 reimbursement of expenses *** of a
12 standing trustee appointed under section
13 586(b) of title 28." The statute is
14 crystal clear -- the court has absolutely
15 no authority to determine Chapter 13
16 standing trustee compensation and
17 expenses. AUST Memo, p.6, lines 17-23.
18

19 The court disagrees. First, the AUST did not quote all
20 the relevant language in §326(b). Section 326(b) provides,
21 in full, the following:

22 (a) In a case under chapter 7 or 11, the court
23 may allow reasonable compensation under section 330
24 of this title of the trustee for the trustee's
25 services, payable after the trustee renders such
26 services, not to exceed fifteen percent on the
27 first \$1,000 or less, six percent on any amount in
28 excess of \$1,000 but not in excess of \$3,000, and
29 three percent on any amount in excess of \$3,000,
30 upon all moneys disbursed or turned over in the
31 case by the trustee to parties in interest,
32 excluding the debtor, but including holders of
33 secured claims.

34 (b) In a case under chapter 12 or 13 of this
35 title, the court may not allow compensation for
36 services or reimbursement of expenses of the United
37 States trustee or of a standing trustee appointed
38 under section 586(b) of title 28, but may allow

1 reasonable compensation under section 330 of this
2 title of a trustee appointed under section 1202(a)
3 or 1302(a) of this title for the trustee's
4 services, payable after the trustee renders such
5 services, not to exceed five percent upon all
6 payments under the plan.

7 (c) If more than one person serves as trustee
8 in the case, the aggregate compensation of such
9 persons for such service may not exceed the maximum
10 compensation prescribed for a single trustee by
11 subsection (a) or (b) of this section, as the case
12 may be.

13 (d) The court may deny allowance of
14 compensation for services or reimbursement of
15 expenses of the trustee if the trustee failed to
16 make diligent inquiry into facts that would permit
17 denial of allowance under section 328(c) of this
18 title or, with knowledge of such facts, employed a
19 professional person under section 327 of this
20 title.

21
22 The introductory phrase in §326(b) states that the
23 statute is applicable: "In a case under chapter 12 or 13 of
24 this title." As the AUST pointed out earlier in her
25 memorandum:

26 Although Mr. Myers has filed a motion in
27 this court it was not filed in a case
28 pending under Title 11, and for the
29 reasons hereinafter discussed, it does
30 not affect a case pending under Title
31 11." AUST Memo, p. 3, lines 17-20.

32
33 Thus, the AUST admits that this matter does not arise:
34 "In a case under chapter 12 or 13 of this title" as required
35 for §326(b) to be applicable. It follows that §326(b) is not
36 applicable.

37 Second, the AUST did not cite subsection (d) of §326,
38 which is quoted above. This statute indicates that Congress

1 did not intend to completely remove these questions from the
2 jurisdiction of the bankruptcy court. The AUST also ignores
3 11 U.S.C. §330(c) which provides:

4 Unless the court orders otherwise, in
5 a case under chapter 12 or 13 of this
6 title the compensation paid to the
7 trustee serving in the case shall not be
8 less than \$5 per month from any
9 distribution under the plan during the
10 administration of the plan.
11

12 The phrase "Unless the court orders otherwise" in this
13 statute demonstrates that Congress did not intend to
14 completely remove the bankruptcy court from issues concerning
15 compensation of standing trustees as is asserted by the AUST.

16 Finally, other courts reviewing the law in this area have
17 not found §326(b) and the related statutes "crystal clear" as
18 the AUST finds them. For example, in In re Savage, 67 B.R.
19 700 (D. R.I. 1986), the District Court described the relevant
20 statutory provisions as constituting:

21 Labyrinthine language [that] cries out
22 with some degree of desperation for the
23 catharsis of an explication. Id. at 703.
24

25 That same court decided that "nothing in the statute's
26 express language resolves this issue with certitude. And,
27 the legislative history is likewise delphic." Id. at 705.³

³ In Savage, the court ultimately found that "policy considerations counsel ineluctably in favor of keeping the judicial nose from poking into the UST's tent." Savage at 707. While the AUST in this case quoted from Savage to support this proposition, she failed to quote the language from Savage that indicates the issue of the court's

1 In In re Sousa, 46 B.R. 343 (Bankr. R.I. 1985), the court
2 was faced with a similar issue in what was then a pilot U.S.
3 Trustee district. The court discussed its authority to
4 review a standing chapter 13 trustee's fees notwithstanding
5 the statutory language that arguably authorizes the Attorney
6 General to set such fees. The court wrote:

7 Administrative fixing of percentage rates
8 of compensation, and judicial review of
9 the reasonableness of such fees are
10 separate functions, and there is nothing
11 inconsistent in the Attorney General
12 fixing such schedules and the Court
13 hearing objections to and determining the
14 reasonableness of fees paid pursuant
15 thereto. We view it as inviolate and
16 fundamental that the adjudicative
17 function of the Court to review disputed
18 fees must, and does remain intact. Id.
19 at 346.

20
21 Later, the court wrote:

22
23 The U.S. Trustee Pilot Program was not
24 designed to usurp any function requiring
25 the exercise of judicial discretion

authority after the advent of the U.S. Trustee system is complex and uncertain. To the contrary, the AUST argues that §326(b)'s language is "crystal clear." AUST Memo, p.6, lines 21-23.

Such exaggeration and selective references to authority by over zealous counsel are all too common in the court's current experience. These questionable practices are an insult to the court's intellect and do not assist the court in reaching a correct decision. The court can no longer rely on counsel to correctly and fully disclose applicable law and must review all cited authorities in their entirety. This costs the court a great deal of effort and time and delays the administration of justice. If it were shown that such practices were intentional rather than mere negligence, they would be grounds for sanctions and possible disciplinary action. See DR 7-102(A)(5) and DR 7-106(B)(1).

1 (indeed, if the legislative intent were
2 so expressed in plain terms, we would
3 then be faced with a serious separation
4 of powers question)." Id. at 347.

5
6 Although the facts in Sousa are not identical to those
7 in the instant case, the reasoning in Sousa strongly supports
8 the conclusion that the court has the authority to determine
9 a dispute concerning a standing chapter 13 trustee's
10 expenses. This court agrees with the reasoning in Sousa.⁴
11 Based on a review of the statutory language, the legislative
12 history and relevant case law, this court concludes that
13 §326(b) was not intended to bar the court from considering
14 the instant motion.

15 3. Attorney General's Authority to Determine "Actual,
16 Necessary Expenses."

17 The AUST argues that:

18 Mr. Myers' motion ultimately challenges a
19 decision that is committed by law to the
20 authority of the Attorney General and the
21 United States Trustee. It is the
22 responsibility of these executive branch
23 officials to fix the percentage fees and
24 maximum annual compensation of chapter 13
25 standing trustees based upon a
26 consideration of the actual , necessary
27 expenses incurred by those individuals as
28 standing trustees. To carry out their
29 statutory duties, these executive branch
30 officials determine the "actual,
31 necessary" expenses that may be
32 reimbursed from the prescribed percentage

⁴ Sousa was effectively overruled by In re Savage, cited
above. This court is not bound by Savage and cites Sousa
because of its persuasive reasoning.

1 of plan payments which standing trustees
2 receive in trust. AUST Memo at p.4,
3 lines 1-11.
4

5 This argument is apparently based on the provisions of
6 28 U.S.C. §586(e)(1) and (2). Again, however, the AUST fails
7 to quote the entire relevant provisions of 28 U.S.C.
8 §§586(e)(1) and (2). 28 U.S.C. §§586(e)(1) and (2) provide:

9 The Attorney General, after
10 consultation with a United States trustee
11 that has appointed an individual under
12 subsection (b) of this section to serve
13 as standing trustee in cases under
14 chapter 12 or 13 of title 11, shall fix-
15 (A) a maximum annual compensation for such
16 individual consisting of-

17 (i) an amount not to exceed the
18 highest annual rate of basic pay in
19 effect for level V of the Executive
20 Schedule; and

21 (ii) the cash value of employment
22 benefits comparable to the employment
23 benefits provided by the United States to
24 individuals who are employed by the
25 United States at the same rate of basic
26 pay to perform similar services during
27 the same period of time; and

28 (B) a percentage fee not to exceed-

29 (i) in the case of a debtor who is
30 not a family farmer, ten percent; or

31 (ii) in the case of a debtor who is
32 a family farmer, the sum of -

33 (I) not to exceed ten
34 percent of the payments made
35 under the plan of such debtor,
36 with respect to payments in an
37 aggregate amount not to exceed
38 \$450,000; and

39 (II) three percent of
40 payments made under the plan of
41 such debtor, with respect to
42 payments made after the
43 aggregate amount of payments
44 made under the plan exceeds

1 \$450,000;
2 based on such maximum annual compensation
3 and the actual, necessary expenses
4 incurred by such individual as standing
5 trustee.
6 (2) Such individual shall collect such percentage
7 fee from all payments received by such individual
8 under plans in the cases under chapter 12 or 13 of
9 title 11 for which such individual serves as
10 standing trustee. Such individual shall pay to the
11 United States trustee, and the United States
12 trustee shall deposit in the United States Trustee
13 System Fund-
14 (A) any amount by which the actual
15 compensation of such individual exceeds 5
16 per centum upon all payments received
17 under plans in cases under chapter 12 or
18 13 of title 11 for which such individual
19 serves as standing trustee; and
20 (B) any amount by which the percentage
21 for all such cases exceeds-
22 (i) such individual's actual
23 compensation for such cases, as adjusted
24 under subparagraph (A) of paragraph (1);
25 plus
26 (ii) the actual, necessary expenses
27 incurred by such individual as standing
28 trustee in such cases. Subject to the
29 approval of the Attorney General, any or
30 all of the interest earned from the
31 deposit of payments under plans by such
32 individual may be utilized to pay actual,
33 necessary expenses without regard to the
34 percentage limitation contained in
35 subparagraph (d)(1)(B) of this section.
36

37 First, contrary to the AUST's assertion, §586(e)(1) does
38 not authorize the United States Trustee to fix the maximum
39 compensation and percentage fee. Rather, the Attorney
40 General is authorized to fix these figures "after
41 consultation with a United States trustee"

42 Second, a careful reading of this statute reveals that

1 the Attorney General is only authorized thereunder to fix:

- 2 1. The standing trustee's maximum annual
3 compensation; and
- 4 2. A maximum percentage fee to be charged
5 against payments received under chapter
6 12 or 13 plans.

7
8 It is important to note that while §586(e)(1) specifies
9 that the Attorney General shall fix these amounts based on
10 the "maximum annual compensation and the actual, necessary
11 expenses incurred by such individual as standing trustee,"
12 §586(e)(2) does not authorize the Attorney General to
13 determine what constitute "actual, necessary expenses" for
14 purposes of determining what must be paid to the United
15 States Trustee fund thereunder.

16 If Congress intended to authorize the Attorney General
17 to make this latter determination, it could have so
18 indicated. Congress made clear its intent that the Attorney
19 General fix the maximum compensation and percentage fee under
20 §586(e)(1). Congress could have added similar language to
21 §586(e)(2)(B)(ii). Congress did not do this and, based on a
22 reading of both subsections of §586(e), this court believes
23 it intentionally chose not to do this.

24 The legislative history to §586(e) states: "The Attorney
25 General is to fix the [percentage] fee based on the salary of
26 the private [standing] trustee and his projected expenses in
27 connection with chapter 13 cases." H.R. Rep. No. 595, 95th

1 Cong., 1st Sess. 440 (1977). (Emphasis added.) This history
2 clarifies that the phrase "based on such ... actual,
3 necessary expenses ... " in §586(e)(1) was intended to
4 indicate that the percentage fee should be set, in part, by
5 projecting future expenses based on past expenses. This is
6 a far cry from saying that the Attorney General was intended
7 to be the final arbiter as to what constitute "actual,
8 necessary expenses" for purposes of determining if there is
9 a surplus under §586(e)(2).

10 The legislative history to 28 U.S.C. §581 states that
11 United States Trustees:

12 [W]ill consult with the Attorney General
13 to fix the fees that a private standing
14 chapter 13 trustee may charge, and the
15 salary that the private trustee may
16 receive. H.R. Rep. 595, 95th Cong., 1st
17 Sess. 109 (1977).

18 This legislative history is notable in that it does not state
19 that United States Trustees shall determine what constitute
20 "actual, necessary" expenses.

21 Thus, neither the statutes nor the legislative history
22 indicate that "the Attorney General and United States
23 Trustees must determine what constitute 'actual, necessary'
24 expenses of standing trustees," as is asserted by the AUST.
25 AUST Memo at p.8, lines 11-14.

26 For the reasons stated, this court concludes that a

determination of the amount to be paid by a standing trustee to the United States Trustee Fund pursuant to §586(e)(2)(A) and (B) was not committed to the Attorney General (or his designate) and should be determined by this court.

4. What Constitute "Actual, Necessary Expenses?"

A. Judicial Determination

The ultimate question raised in this matter is whether the costs of defending the lawsuit against Myers constitute an "actual, necessary expense" under §586(e)(2).

The AUST argues that:

Because Congress has not defined the "actual, necessary" expenses of standing trustees, the court should defer to the Program's policy statement interpreting 28 U.S.C. § 586(e) and its decision with regard to Mr. Myers' claim based thereon, because the policy has been rendered by the agency in charge of administering [the] statute and is "based on a permissible construction of the statute." Memo at pp.8-9, lines 20-25 and 1. (Citing Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901, 907 (9th Cir. 1990) and Department of Treasury, I.R.S. v. FLRA, 110 S. Ct. 1623 (1990). AUST Memo, p.8-9, lines 20-25 and 1-3.

First, as just stated, this court does not agree that "the policy has been rendered by the agency in charge of administering the statute" as claimed by the AUST. Disputes over the interpretation of §586(e)(2) can readily be settled by a court. Thus, the court need not defer to the EOUST's construction of the statute and the court may determine the

1 question without regard thereto.

2 As with any question of statutory construction, the
3 starting place is the language of the statute itself. U.S.
4 v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1025
5 (1989). The key phrase in the statute is the "actual,
6 necessary expenses incurred by such individual as standing
7 trustee in such [chapter 12 or 13] cases." 28 U.S.C.
8 §586(e)(2)(ii). No one seems to dispute that the expenses in
9 question were "actually" incurred. Thus, the only issues are
10 whether the expenses were "necessary" and whether they were
11 incurred by Myers as standing trustee in chapter 13 cases.

12 Taking the second issue first, it can hardly be said that
13 the costs of defending an age discrimination lawsuit brought
14 by a former employee of the standing trustee's office were
15 not incurred by Myers due to his position as standing trustee
16 in chapter 13 cases. It would be absurd to argue, and the
17 court does not understand the AUST to be arguing, that these
18 expenses were incurred by Myers in any other capacity. It
19 therefore appears that the only real issue is whether these
20 expenses were "necessary."

21 The term "necessary" is not defined in the relevant
22 statutes and cannot be defined without reference to the
23 context. The present matter arises in a business setting and
24 requires a determination of what constitute expenses

1 reasonably necessary in order to carry on the business of
2 administering chapter 13 estates. Thus, the court turns to
3 other areas of business law to find assistance in defining
4 the scope of "necessary" expenses in this context.

5 In the case of a former employee's claim against a
6 corporation for alleged discrimination or harassment, the
7 former employee may file a complaint against the corporation
8 and an individual employed by the corporation. In that case,
9 the individual accused of the wrongful conduct as well as the
10 corporation may incur legal expenses in defending the case.
11 The issue then often arises if the individual is entitled to
12 be reimbursed for his legal expenses. This is generally
13 considered under the rubric of "indemnification."

14 The case at bar is very similar to a director's claim
15 against a corporation for indemnification. Under the law of
16 many states and under the Revised Model Business Corporations
17 Act of 1984 ("RMBCA"), if the complaint was filed against a
18 director or officer based on business-related conduct, the
19 law allows the corporation to indemnify the individual for
20 the expenses incurred in defending the complaint. RMBCA
21 §8.51(a).

22 Moreover, under the RMBCA, to the extent the individual
23 is successful in defending the claim on the merits or
24 otherwise, the law requires indemnification. RMBCA §8.52.

1 This requirement has been adopted, with minor variations at
2 various times, by the following states: Alabama, Alaska,
3 Arizona, Arkansas, California, Colorado, Delaware, Florida,
4 Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas,
5 Kentucky, Louisiana, Maine, Maryland, Missouri, Montana,
6 Nebraska, Nevada, New Hampshire, New Jersey, New Mexico,
7 Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South
8 Dakota, Tennessee, Texas, Utah, Washington, West Virginia,
9 Wisconsin and Wyoming.⁵ Thus, the vast majority of states
10 recognize the need for indemnification of innocent officers
11 or directors.

12 The "mandatory indemnification" laws have developed
13 because of the obvious injustice in denying such
14 indemnification claims to an employee on a limited salary who
15 was acting properly and in the scope of his employment.
16 Mandatory indemnification has also developed because of the
17 lack of insurance and the practical consequences of failing
18 to reimburse directors for the defense costs of unfounded
19 lawsuits, namely, that few qualified people will serve as
20 corporate directors and officers with a limited pay when they

⁵ In many states, where the individual acted in good faith and reasonably believed his/her actions were in the best interests of the corporation, the corporation may indemnify the individual even if a judgment, order, settlement, conviction or plea of nolo contendere is the ultimate outcome of the lawsuit.

1 are exposed to unlimited potential liability even if they
2 have committed no wrong. See, e.g., Slaughter, Statutory and
3 Non-Statutory Responses to the Director and Officer Liability
4 Insurance Crisis, 63 Ind. L. J. 181, Winter, 1987.

5 The analogy between the corporate law of indemnification
6 and the case at bar is apt. The EOUST takes the position
7 that the standing chapter 13 trustee is not an employee of
8 the United States but is more akin to an independent
9 contractor. July 20, 1992 letter (Exhibit #1), p.5. Whether
10 this is correct or not, the standing chapter 13 trustee is
11 entitled by statute to a fixed salary and, in effect, to be
12 reimbursed for all the reasonably necessary office expenses
13 incurred in conducting the business of a standing trustee
14 (except, according to the EOUST, the expense at dispute
15 here). These are not attributes of independent contractors.
16 These attributes do, however, closely resemble the attributes
17 of a corporate officer.

18 Given the limited compensation and reimbursement of
19 expenses as fixed by statute, it cannot reasonably be argued
20 that the standing trustee system established in §586(e)(1)
21 and (2) is intended to place the risk of loss, in the
22 entrepreneurial sense, on the standing trustee. Rather,
23 considering the compensatory scheme outlined in the statutes,
24 it seems Congress intended to insulate the standing trustee

1 from most of the normal risks associated with conducting a
2 private enterprise. It is illogical and contrary to the
3 legislative scheme to argue, as the EOUST and the AUST do in
4 this case, that a standing trustee should bear the risk of
5 unlimited financial exposure to defense costs associated with
6 unfounded lawsuits while being strictly limited in the
7 compensation he can receive.

8 The field of tax law is also instructive in determining
9 whether such defense costs are a necessary expense. Under 26
10 U.S.C. §162(a), individuals and corporations are allowed to
11 deduct all the "ordinary and necessary expenses paid or
12 incurred during the taxable year in carrying on any trade or
13 business" Pursuant to that section, the regulations
14 adopted thereunder at 26 C.F.R. 1.162, and countless cases,
15 it is well established that legal fees for defending lawsuits
16 related to business activities are deductible as "ordinary
17 and necessary" expenses. This lends support to Myers's
18 position.

19 Further, in an equitable sense, it is unfair in the
20 instant case to fail to advise the standing trustee of his
21 potential liability for such expenses until after the issue
22 has arisen and some of the costs have been incurred. The
23 AUST admits that the EOUST's policy was adopted after the
24 EOUST was advised that the lawsuit against Myers was

1 instituted.

2 The AUST argues that: "[A] lot of our decision on this
3 policy matter was based on the broad public policy of [sic,
4 probably intended to say "against"] employment discrimination
5 and the importance of that in our country." Transcript of
6 Proceedings, September 10, 1992, p. 12, lines 5-7. This
7 argument would carry some weight if the EOUST had established
8 that Myers had violated the age discrimination laws. As
9 previously stated, however, the EOUST has made no
10 investigation into the facts of the claim to determine
11 whether the law was violated. The AUST conceded at one of
12 the hearings on this motion that she did not know whether
13 Myers violated the law. As a result of the U. S. District
14 Court's dismissal of the complaint filed by Myers's former
15 employee, it has now been determined by that court that the
16 former employee failed to state a claim for relief. The
17 former employee could not even allege that Myers violated the
18 law, let alone prove it. Thus, the basis for the EOUST's
19 decision was clearly erroneous.

20 The AUST and EOUST's failure to differentiate between
21 actual wrongdoing on the part of a standing trustee and mere
22 allegations of wrongdoing is the fatal and recurrent flaw in
23 its analysis of this issue.⁶ If the position urged by the

⁶ Even after the U.S. District Court dismissed the
 complaint against Myers, the AUST filed a memorandum of law

1 AUST were adopted by this or any other court, perfectly
2 competent and blameless trustees could be financially
3 destroyed by frivolous lawsuits related to their activities
4 as trustees. Such a policy would make it difficult to find
5 competent individuals to serve as standing trustees. It is
6 well known by experienced business people and all attorneys
7 that frivolous lawsuits may be filed against anyone at any
8 time. As discussed above, many such lawsuits may not, as a
9 practical matter, be insured against. Given the litigious
10 age in which we live, the number of competent business people
11 or lawyers willing to serve as standing trustees on a limited
12 salary would be severely diminished if they were advised they
13 would be exposed to unlimited liability for defense costs
14 associated with ungrounded lawsuits related to their

in which she continues to assume that Myers violated the employment discrimination laws. In a "Supplemental Memorandum of Law in Response to Amended Motion" dated and filed on October 19, 1992, the AUST writes:

The Program takes the position that reimbursement of discrimination litigation expenses is contrary to the intent of the statute, insofar as employment discrimination is beyond the scope of the activities for which a standing trustee is employed.

Supplemental Memo, p.3, lines 11-15.

This consistent failure to recognize that Myers was never determined to have violated the law, even after the complaint against him was dismissed, is incomprehensible to the court. This failure is indicative of the AUST and EOUST's inability to grasp the issue at hand and render a logical response thereto.

1 activities as trustees.

2 Based on the analogy to the corporation law just recited,
3 the guidance offered by the Internal Revenue Code and
4 regulations, public policy and equitable considerations, the
5 court rules that Myers's expenses in defending a former
6 employee's lawsuit based on alleged wrongful termination in
7 the course of conducting his business as a standing chapter
8 13 trustee is a necessary expense under 28 U.S.C. §586(e)(2)
9 where he has prevailed in defending the charge.

10 Given the U.S. District Court's determination that the
11 plaintiff failed to state a claim, it is apparent that Myers
12 did not violate the law and the expenses in question should
13 be approved.

14 B. Judicial Review of Agency's Action.

15 Even if the determination of what constitutes actual,
16 necessary expenses under 28 U.S.C. §586(e)(2) were
17 appropriately made by the EOUST, such determination is not
18 insulated from judicial review. In her memorandum, the AUST
19 quotes the following language from Florida Power & Light v.
20 Lorion, 470 U.S. 729, 743-44 (1984):

21 The focal point for judicial review
22 should be the administrative record
23 already in existence, not some new record
24 made initially in the reviewing court.
25 AUST's Memorandum of Law in Support of
26 the U. S. Trustee's Response to the
27 Amended Motion, p.4, lines 7-9.
28

1 The AUST fails, however, to quote the following sentence
2 from that opinion:

3 The task of the reviewing court is to
4 apply the appropriate APA standard of
5 review, 5 U.S.C. §706, to the agency
6 decision based on the record the agency
7 presents to the reviewing court. Id. at
8 743-44, citing Citizens to Preserve
9 Overton Park v. Volpe, 401 U.S. 402
10 (1971).

11 The AUST's failure to complete the quote from Florida
12 Power & Light v. Lorin is understandable, however, given the
13 AUST and EOUST's total disregard for the principles of
14 administrative law and the specific provisions of the
15 Administrative Procedures Act.
16

17 Pursuant to 5 U.S.C. §701(a), chapter 7 of title 5:

18 "[A]ppplies, according to the provisions thereof,
19 except to the extent that-

20 (1) statutes preclude judicial review;

21 or

22 (2) agency action is committed to agency
23 discretion by law."
24

25 The relevant statutes in this case do not preclude
26 judicial review. The exception for matters "committed to
27 agency discretion by law" is a very narrow one. Assoc. Elec.
28 Co-op., Inc. v. Morton, 507 F.2d 1167 (D.C. Cir. 1974). The
29 nonreviewability of agency action is the exception and not
30 the rule and the federal agency seeking to preclude judicial
31 review bears a heavy burden to overcome the strong
32 presumption that Congress intended to permit judicial review.

1 City of Camden v. Plotkin, 466 F. Supp. 44 (D.C. N.J. 1978).
2 Further, the intent to restrict judicial review must be shown
3 by clear and convincing evidence. Id.

4 As previously discussed, this court does not believe that
5 the determination of what constitutes an "actual, necessary
6 expense" under 28 U.S.C. §586(e)(2) has been left to the
7 determination of the Attorney General or the EOUST. Even if
8 it has, however, the exception to judicial review of agency
9 action stated in 5 U.S.C. §701(a)(2) does not apply in this
10 case where there is no proof, let alone clear and convincing
11 proof, that agency action was committed to agency discretion
12 by law.

13 This is especially true where the issue does not require
14 the exercise of expert judgment within the special competence
15 of the agency rather than an essentially legal determination.
16 Ardestani v. INS, 112 S. Ct. 515 (1991). The issue in this
17 case involves a legal interpretation of Congressional intent
18 in drafting 28 U.S.C. §586(e)(2). No special expertise,
19 other than legal training, is required to determine the scope
20 of the phrase "actual, necessary expenses." Thus, the
21 exception under 5 U.S.C. §701(a)(2) is not applicable and
22 judicial review is appropriate.

23 Under the relevant portions of 5 U.S.C. §701(b)(1),
24 "agency" means:

1 [E]ach authority of the Government of the
2 United States, whether or not it is
3 within or subject to review by another
4 agency
5

6 Pursuant to specific authorization under 5 U.S.C. §301
7 the Department of Justice has prescribed certain regulations
8 for the conduct of its internal affairs. In accordance with
9 5 U.S.C. §301 and the Attorney General's power to appoint
10 United States Trustees in certain districts under 28 U.S.C.
11 §581 et seq, 28 C.F.R. 0.1 describes the United States
12 Department of Justice as consisting of several "principal
13 organizational units" including the "Executive Office for
14 United States Trustees."

15 Therefore, it appears the EOUST is an "agency" under 7
16 U.S.C. §701(b)(1) since it is an authority of the United
17 States government even though it is subject to review by the
18 U.S. Department of Justice.

19 5 U.S.C. §702 provides, in relevant part:

20 A person suffering legal wrong because of
21 agency action, or adversely affected or
22 aggrieved by agency action within the
23 meaning of a relevant statute, is
24 entitled to judicial review thereof.
25

26 Thus, Myers is entitled to judicial review of the EOUST's
27 action.

28 Where no statutory scheme for review exists, as is true
29 in this case, "any applicable form of legal action" is
30 appropriate. 5 U.S.C. §703. Thus, it appears the present

1 motion satisfies this criterion.⁷

2 Under 5 U.S.C. §704, final "agency action" is reviewable
3 by a court where there is no other adequate remedy in a
4 court.

5 The term "agency action" is defined by reference to 5 U.S.C.
6 §551(13) as follows:

7 "[A]gency action" includes the whole or
8 part of an agency rule, order, license,
9 sanction, relief, or the equivalent or
10 denial thereof, or failure to act.
11

12 Under 5 U.S.C. §551(a)(4) and (6), "rule" and "order,"
13 are defined as follows:

14 (4) "rule" means the whole or a part of
15 an agency statement of general or
16 particular applicability and future
17 effect designed to implement, interpret,
18 or prescribe law or policy or describing
19 the organization, procedure, or practice
20 requirements of an agency and includes
21 the approval or prescription for the
22 future of rates, wages, corporate or
23 financial structures or reorganizations
24 thereof, prices, facilities, appliances,
25 services or allowance therefor or of
26 valuations, costs, or accounting, or
27 practices bearing on any of the
28 foregoing.
29

30 (6) "order" means the whole or a part of
31 a final disposition, whether affirmative,
32 negative, injunctive, or declaratory in
33 form, of an agency in a matter other than
34 rule making but including licensing.

⁷ As stated previously, the EOUST has failed to raise any procedural objections and seems content with the present procedural posture. Thus, to the extent there are any procedural inadequacies, the court considers them to have been waived.

1 In this case, the EOUST's "policy analysis", as set forth
2 in the July 10, 1992 memorandum, is a "rule" under
3 §551(a)(4). The July 20, 1992 letter to Myers's counsel,
4 which letter denied Myers's request for approval to retain
5 surplus funds is an "order" under §551(a)(7). Thus, both the
6 July 10, 1992 memorandum and the July 20, 1992 letter
7 constitute "agency action" which are reviewable pursuant 5
8 U.S.C. §704.

9 Under 5 U.S.C. §706(2)(A), the court shall:

10 hold unlawful and set aside agency
11 action, findings, and conclusions found
12 to be arbitrary, capricious, an abuse of
13 discretion, or otherwise not in
14 accordance with law.
15

16
17 Under this provision, the court specifically finds that
18 the EOUST's actions were arbitrary and capricious. The July
19 10, 1992 memorandum dealt with the payment of defense costs
20 of, and damages awarded against, a standing trustee who was
21 found to have violated the law. That is not the case here.
22 The July 20, 1992 letter denying Myers's request, however,
23 purports to rely on the July 10, 1992 memorandum. Since the
24 July 10 memorandum was based on different facts, the
25 reasoning related to those facts is not particularly helpful
26 in this case.

27 Although the July 20, 1992 letter to Myers purports to
28 rely on the July 10, 1992 memorandum and "such additional

1 considerations as are set forth in this letter" no additional
2 considerations are stated. Instead, the relevant portion of
3 the July 20, 1992 letter is a nearly verbatim restatement of
4 selected portions of the July 10, 1992 memorandum. Again, it
5 must be remembered that the July 10 memorandum was based on
6 the assumption that the standing trustee had committed a
7 wrongful act. A careful reading of the July 20, 1992 letter
8 reveals that it too proceeded from this erroneous assumption.
9 This fact is evidenced by the following paragraph from the
10 July 20, 1992 letter which, in conjunction with the stated
11 reliance on the July 10, 1992 memorandum, constitutes the
12 entire discussion of the reasons for denying Myers's request:

13 "The monies held in trust by a standing
14 trustee are separate and distinct from
15 the standing trustee. The standing
16 trustee is a fiduciary responsible for
17 the trust funds. The trust does not
18 carry out the duties set forth in the
19 Bankruptcy Code, the standing trustee
20 does. In this sense, individuals
21 assisting the standing trustee are
22 employees not of the trust, but of the
23 standing trustee. Their
24 responsibilities, working hours,
25 conditions, and salary, none of which are
26 unique to the administration of
27 bankruptcy cases, are determined by the
28 standing trustee, as employer. Their
29 relationship is with the standing
30 trustee, not the trust. Any allegations
31 of discriminatory conduct arising in that
32 employment relationship exceeds [sic] the
33 bounds of the trustee's primary duty,
34 which is to administer bankruptcy cases,
35 and trust funds should not be expended to
36 relieve an employer of personal liability

1 for such conduct. To hold otherwise
2 would render the trust funds an overall
3 insurance policy for discriminatory
4 conduct by standing trustees, contrary to
5 the trustees' fiduciary duties and
6 contrary public policy. July 20, 1992
7 letter from Martha Davis, General
8 Counsel, EOUST, p.2. (Emphasis added.)
9

10 It is obvious from the underlined portion of the letter,
11 that the decision was based on an assumption that Myers had
12 engaged in "discriminatory conduct." This assumption was not
13 based on any facts. As previously discussed, the AUST
14 admitted that she did not know whether Myers had
15 discriminated against the former employee. This assumption
16 proved incorrect as evidenced by the U.S. District Court's
17 dismissal of the complaint.

18 The quoted language from the July 20, 1992 letter is so
19 poorly written and difficult to understand that it borders on
20 nonsense and gives new meaning to the term "bureaucratic
21 doublespeak." For example, the first sentence purports to
22 give relevance to the fact that "monies held in trust are
23 separate and distinct from" the trustee. It is doubtful that
24 anyone involved in this case believes that trust assets are
25 not distinguishable from human beings. This fact is
26 irrelevant.

27 The third sentence reads:

28 The trust does not carry out the duties
29 set forth in the Bankruptcy Code, the
30 standing trustee does.

1 Again, the author seems to believe there is some concern that
2 a legal fiction, a trust, can act without human intervention.
3 It is impossible to understand how this obvious statement of
4 fact is relevant and helpful to the determination of what
5 constitutes an "actual, necessary expense" under the statutes
6 in question. The next several sentences are an attempt
7 to establish that individuals assisting the standing trustee
8 are his employees and not employees of the trust. Whether
9 this is a correct statement of the law is debatable but it is
10 not debatable that
11 the costs associated with hiring and retaining these
12 employees are satisfied from the trust funds pursuant to the
13 statutory scheme. See 28 U.S.C. §586(e)(2). Were this not
14 the case, this matter would never have arisen.

15 Further, although the author of the letter from the
16 EOUST's office states that the salaries of such employees are
17 determined by the standing trustee, the "Handbook for Chapter
18 13 Standing Trustees" ("Handbook") dated September 1991
19 (which was prepared by the EOUST's office) contains detailed
20 limits on employee salaries and benefits. The relevant
21 portion of the handbook states:

22 **Employee Salaries and Benefits:** Regular
23 salaries and wages, including bonuses
24 paid directly to employees and amounts
25 withheld for employees' share, and
26 including amounts paid for employer's
27 share of retirement and insurance

1 contributions, taxes, etc. Employee
2 salary and benefits will be reviewed and
3 monitored to ensure they are commensurate
4 with services performed, but shall not
5 exceed the limitations in 28 U.S.C.
6 586(e). No employee of a Chapter 13
7 trustee may receive compensation and
8 benefits of a value greater than the
9 maximum allowable statutory compensation
10 for a chapter 13 trustee.

11 Each Chapter 13 trustee must have a
12 written position description for each
13 employee. These position descriptions
14 should itemize all duties performed by
15 each employee with sufficient clarity and
16 detail that the positions described can
17 be graded for purposes of determining
18 salary, benefits, and promotion. The
19 position description or descriptions must
20 accompany the yearly budget when
21 submitted.

22 Should the trustee wish to increase
23 the compensation and benefits of an
24 employee during any twelve month period,
25 the trustee shall provide the United
26 States Trustee with an appropriate
27 amendment to his/her budget, including a
28 written justification for the increase.
29 The applicable position description must
30 accompany the amended budget. Handbook,
31 p. 13.

32
33 Thus, to the extent it is relevant, the underlying
34 assumption that salaries are set by the standing trustee is
35 incorrect.

36 The next sentence of the letter states:

37 Any allegations of discriminatory conduct
38 arising in that employment relationship
39 exceeds [sic] the bounds of the trustee's
40 primary duty, which is to administer
41 bankruptcy cases, and trust funds should
42 not be expended to relieve an employer of
43 personal liability for such conduct.
44

1 The reader of this sentence is told that "allegations of
2 discriminatory conduct" exceed the trustee's duty. This
3 makes one wonder if the author of the letter understood that
4 the standing trustee did not make the allegations of
5 discriminatory conduct. If the author understood this fact,
6 how is it relevant to the question at hand that a trustee's
7 duties do not include making allegations of discriminatory
8 conduct?

9 One has to guess at what the author meant in order to
10 make any sense out of this sentence in the context in which
11 it was written. It is possible the author intended to write
12 that discriminatory conduct is (obviously) not authorized and
13 liability related thereto will not be indemnified with the
14 expenditure of trust funds. While this might be a reasonable
15 policy, it is not the policy adopted by the EOUST and is not
16 relevant to the question at bar since Myers has not been
17 determined by the EOUST or anyone else to have engaged in
18 such conduct. In fact, as previously mentioned, the only
19 determination to date was rendered by the U.S. District Court
20 that Myers did not violate the law.

21 The memorandum dated July 10, 1992 is rife with similar,
22 and in some cases identical, examples of irrelevant
23 statements of undisputed principles of law, nonsensical
24 sentences and conclusory statements.

1 The first paragraph of the memorandum describes the issue
2 as whether trust funds should be used to pay an award for
3 employment discrimination and the legal costs associated
4 therewith. As stated before, that is not the issue in this
5 case.

6 The second paragraph is a long-winded version of this
7 court's premise that the starting point in the analysis is
8 the language of the statute. Unfortunately, however, the
9 language of the statute is never recited.

10 The second page begins with an analysis under the heading
11 of "Statutory Framework." The first paragraph therein
12 begins with a recitation of the chapter 13 process. This
13 paragraph also includes a footnote with a completely
14 irrelevant statement of the eligibility requirements for
15 chapter 13 relief. The second paragraph states the obvious:
16 That monies paid to a trustee are held in trust for the
17 benefit of certain beneficiaries. This paragraph also
18 includes a footnote that states, without any statutory or
19 regulatory reference or legal analysis, one of the ultimate
20 questions to be decided, that is:

21 By delegation from the Attorney General,
22 the Director, Executive Office for United
23 States Trustees, has responsibility to
24 establish the level of compensation and
25 expenses. (Emphasis added.)

26 The third paragraph of the "Statutory Framework" part of

1 the memorandum, for the first time, refers to 28 U.S.C.
2 §586(e)(1). Unfortunately, however, the author again fails
3 to quote the language thereof.

4 The fourth paragraph finally refers to the language of
5 §586(e)(2)(b)(ii). Again, however, the author fails to quote
6 the language of the statute. The exact language of
7 §586(e)(2) follows:

8 Such individual shall collect such
9 percentage fee from all payments received
10 by such individual under plans in the
11 cases under chapter 12 or 13 of title 11
12 for which such individual serves as
13 standing trustee. Such individual shall
14 pay to the United States trustee, and the
15 United States trustee shall deposit in
16 the United States Trustee System Fund ---

17 (A) any amount by which the actual
18 compensation of such individual exceeds 5
19 per centum upon all payments received
20 under plans in cases under Chapter 12 or
21 13 of title 11 for which such individual
22 serves as standing trustee; and

23 (B) any amount by which the percentage
24 for all such cases exceeds ---

25 (i) such individual's actual
26 compensation for such cases, as adjusted
27 under subparagraph (A) of paragraph (1);
28 plus

29 (ii) the actual, necessary expenses
30 incurred by such individual as standing
31 trustee in such cases. Subject to the
32 approval of the Attorney General, any or
33 all of the interest earned from the
34 deposit of payments under plans by such
35 individual may be utilized to pay actual,
36 necessary expenses without regard to the
37 percentage limitation contained in
38 subparagraph (d)(1)(B) of this section.
39

40 The failure to analyze the exact language of the statute

1 leads the author of the July 10, 1992 memo to state that:

2 The extent of expenses the standing
3 trustee may receive is governed by the
4 "actual, necessary" language of
5 §586(e)(1) and §586(e)(2)(B)(ii).
6

7 This statement is incorrect. First, a standing trustee
8 does not "receive" expenses; a standing trustee "incurs"
9 expenses. Second §586(e)(2) provides that the standing
10 trustee shall pay to the United States Trustee the amount by
11 which the payments received under chapter 12 or 13 plans
12 exceed his compensation and "actual, necessary" expenses.
13 This payment to the U.S. Trustee under §586(e)(2) may
14 therefore be thought of as a payment of surplus funds. Thus,
15 the fourth paragraph of this section of the EOUST's
16 memorandum imprecisely paraphrases the statutory language.
17 The fourth paragraph also lacks any meaningful analysis of
18 the statutory scheme except to state that the terms "actual,
19 necessary" must be terms of restriction rather than
20 expansion.

21 It is important to note at this point that the July 10,
22 1992 memorandum has so far failed to quote the relevant
23 statutory language and has engaged in virtually no logical
24 analysis thereof. Despite this fact, the fifth and final
25 paragraph of the "Statutory Framework" section of the
26 memorandum states:

27 In view of the statutory language

1 describing the type of expenses, and
2 requiring expenses to relate directly to
3 the administration of cases, we conclude
4 that trust monies may not be used to pay
5 or settle employment discrimination
6 claims. As set forth below, the
7 statutory language reflects important
8 policies that demand such a view.
9

10 Again, the EOUST's statement is incorrect. The statutory
11 language in question does not require the expenses to "relate
12 directly to the administration of cases." Since the
13 statutory language was never quoted, however, this
14 misstatement of the statute was possible.

15 The next section of the memorandum is entitled "Case Law"
16 and cites therein three cases. The first two cases are cited
17 for the proposition that "courts generally allow
18 reimbursement for expenses incurred to render benefit to a
19 specific case." The two cases refer to the reimbursement of
20 postage and transcription fees incurred in chapter 7 and 11
21 cases. While this may be a correct statement of the law, it
22 is not relevant to the issue at hand. No one argues that the
23 costs associated with a former employee's lawsuit are the
24 same as the transcription fees and postage charges incurred
25 in administering an individual estate under chapter 7 or 11.
26 Thus, these two case citations are pointless.

27 The next paragraph of this section begins with a
28 recognition that the preceding paragraph was irrelevant and
29 that the parallels between chapter 7 and 11 cases and chapter

1 13 cases "are difficult." The only other case cited in the
2 "Case Law" section of the memorandum is cited for the
3 undisputed proposition that "the costs of administration are
4 distributed across all cases." Rather than supporting the
5 EOUST's position, this fact supports Myers's position.

6 Thus, the entire section entitled "Case Law" contains no
7 citation to or analysis of any opinions that support the
8 conclusion reached by the EOUST.

9 Page 4 of the memorandum begins with a section entitled
10 "Standing Trustee as a Fiduciary." The first two paragraphs
11 of this section consist of an irrelevant analysis of the
12 nature of funds paid to a standing trustee. The third
13 paragraph begins with the previously mentioned sentence about
14 the trust monies being separate and distinct from the trustee
15 and concludes with a quote from a case to the effect that a
16 trustee who fails to discharge a duty to the trust may be
17 surcharged. Again, this may be correct but is irrelevant in
18 this case since Myers did not fail to discharge any duty to
19 the trust.

20 The fourth and final paragraph of this section begins
21 with the meaningless introductory phrase, "To one degree or
22 another" and reads: "To one degree or another the law has
23 always held the trustee accountable and personally
24 responsible for the administration of the trust" The

1 reader is left to wonder to what degree the law does hold
2 trustees personally accountable. Again, no one disputes that
3 trustees are accountable for the administration of the trust.
4 The quoted statement is simply irrelevant.

5 This paragraph also recites that trustees should take
6 care not to expend greater funds than are reasonably
7 necessary in administering the trust. Based on this
8 undisputed and irrelevant black letter law, the author of the
9 July 10, 1992 memorandum concludes:

10 The law's historical perspective has been
11 to protect the trust corpus, even at the
12 risk of exposing the trustee to
13 liability. Our conclusion that
14 employment discrimination claims are not
15 "actual, necessary expenses" is
16 consistent with this perspective.
17

18 This conclusion is based on no previous citation for the
19 proposition that a trust corpus is to be protected even at
20 the expense of the trustee. Further, the issue in this case
21 is not whether "employment discrimination claims" are actual,
22 necessary expenses. Claims are not expenses. The issue in
23 this case is whether the expenses incurred in defending such
24 a claim are "actual, necessary" expenses under the statute.
25 The quoted statement is wholly conclusory and unsupported by
26 any analysis.

27 The next section of the memorandum, beginning on page 5,
28 is entitled "Role of the Standing Trustee." The first

1 paragraph of this section concludes that standing trustees
2 are not employees of the United States and "are afforded wide
3 discretion in carrying out their responsibilities." The
4 relevance of this statement to the question at hand is never
5 explained and escapes the court.

6 The second paragraph of this section includes the
7 following sentence:

8 The trust does not carry out the Code's
9 responsibilities, the standing trustee
10 does.
11

12 Based on this observation, the paragraph concludes that
13 claims of those arising from employment related to trust
14 administration arise solely against the trustee.

15 Again, one wonders if the author of the quoted sentence
16 understands that a trust is a legal fiction similar to a
17 corporation that has no physical existence. Obviously,
18 trusts and corporations cannot act without human
19 intervention. It does not necessarily follow from this fact
20 that a trust can never be held accountable for the acts of
21 its trustee. Certainly, no authority is cited for this
22 proposition. Again, it must be remembered that Myers has not
23 been determined to have committed any wrongful act.

24 This second paragraph of this section also incorrectly
25 states that the salaries of individuals assisting the
26 standing "are determined by the standing trustee, as

1 employer." As previously mentioned, this contradicts the
2 Handbook for Chapter 13 trustees published by the EOUST which
3 purports to limit the salaries of such individuals assisting
4 the Chapter 13 trustee.

5 Page 6 of the July 10, 1992 memorandum is entitled "Equal
6 Employment Opportunity Laws." This section discusses that
7 public policy dictates discouraging individuals from
8 violating the law. While this can hardly be disputed, it is
9 irrelevant to the issue at bar since Myers was determined not
10 to have violated the law.

11 The second section on page 6 of the memorandum is
12 entitled "Standing Trustee as Compared to Private
13 Enterprise." This section notes that everyone is subject to
14 potential frivolous lawsuits and that the standing trustee's
15 compensation and expenses are "established by a regulatory
16 agency." The author fails to recognize, however, that these
17 facts argue in favor of treating the costs associated with
18 such lawsuits as actual, necessary expenses, as discussed
19 above.

20 The second paragraph of this section recognizes that
21 "elements of unfairness flow from" the rule enunciated in the
22 memorandum. This unfair result is justified, however, with
23 the following conclusory sentence:

24 The law, in establishing the
25 compensation standing trustees may

1 receive as well as the expenses that will
2 be allowed, has allocated risk and the
3 exposure to liability.
4

5 This is simply not the case. The law does not directly
6 answer what expenses will be allowed. If it did, there would
7 be no need for this court's intervention. No part of the
8 memorandum that precedes this sentence supports the
9 conclusion that the law has allocated the risk of exposure to
10 defense costs to the standing trustee. In fact, this court,
11 which is primarily engaging in determining the state of the
12 law, disagrees with that conclusion. Thus, this unsupported
13 and conclusory statement is not the least persuasive.

14 The final section of the memorandum is entitled
15 "Summary." The "Summary" adds nothing to the previous
16 arguments and, not surprisingly, concludes that expenses
17 related to employment discrimination claims and defense costs
18 may not be allowed in this context.

19 "Arbitrary and capricious" action has been described in
20 numerous ways. Common to all the descriptions is the concept
21 that the action is not based on reason or logic. See, e.g.,
22 Bowman Transportation, Inc. v. Arkansas-Best Freight System,
23 Inc., 419 U.S. 281 (1974). The July 10, 1992 memorandum and
24 the July 20, 1992 letter to Myers contain no logical basis
25 for the action taken. This is largely due to the EOUST's
26 failure to recognize the difference between allegations of

1 wrongdoing and actual wrongdoing. In sum, the July 10, 1992
2 memorandum and the July 20, 1992 letter represent agency
3 action that is so out of touch with the issues presented for
4 determination and so lacking in legal logic and reason that
5 they constitute classic examples of "arbitrary and
6 capricious" action.

7 **CONCLUSION**

8 In conclusion, this court holds that the determination
9 of "actual, necessary expenses" under 28 U.S.C. §586(e)(2) is
10 not left to the Attorney General (or his delegate) but, in
11 the absence of agreement, to judicial determination. The
12 court concludes that it is authorized to make this
13 determination and that the expenses in question are "actual,
14 necessary expenses" since it has been determined by a court
15 of competent jurisdiction that Myers did not violate the law.

16 Even if the determination of "actual, necessary expenses"
17 under 28 U.S.C. §586(e)(2) were appropriately made in the
18 first instance by the EOUST, its determination in this case
19 was arbitrary and capricious and cannot stand.

20 The EOUST has not objected to the amount of the expenses
21 incurred as being unreasonable. It is not clear whether this
22 information has been requested by or provided to the EOUST or
23 the AUST. Thus, Myers is hereby directed to promptly advise
24 the Court, the EOUST and AUST in writing of the expenses in

1 question. If the EOUST or the AUST fail to file written
2 objections thereto with the court within 20 days after
3 service of the information from Myers, Myers may submit an
4 order authorizing the trustee to withhold sufficient sums
5 from the funds that would otherwise constitute "surplus"
6 under 28 U.S.C. §586(e)(2) as are necessary to meet the
7 actual expenses incurred in the defense of the claim
8 discussed herein. To the extent the trustee has expended
9 personal funds in this regard, the order may provide for
10 reimbursement of the actual expenses incurred in such
11 defense.

12 DATED this ____ day of November, 1992.

13 _____
14 Henry L. Hess, Jr.
15 Bankruptcy Judge
16
17
18

19 cc: Paul S. Cosgrove
20 Pamela Griffith
21 Robert W. Myers
22
23
24



U.S. Department of Justice

Executive Office for United States Trustees

Washington, D.C. 20530

July 20, 1992

VIA FEDERAL EXPRESS

Paul S. Cosgrove, Esq.
Gardner, Cosgrove & Gardner
121 S.W. Salmon Street, Suite 1400
Portland, Oregon 97204-2924

Re: Robert W. Myers, Chapter 13 Standing Trustee

Dear Mr. Cosgrove:

By way of this letter, I wish to formally respond to Mr. Myers' request to use expense funds to pay the cost of defending an age discrimination action that has been brought by a former employee. I also wanted to clarify the United States Trustee's request for turnover of surplus funds.

First, the United States Trustee Program has determined not to authorize Mr. Myers' request for reimbursement. For purposes of reaching our decision, we have considered Ms. Theresa Miller's letters of May 23, 1992¹ and June 17, 1992, to Assistant United States Trustee Pam Griffith forwarding documents and requesting permission, on behalf of Mr. Myers, to pay costs arising in connection with the age discrimination action brought by Ms. Vicki L. Barnett (Barnett v. Myers, USDC, D. Ore., Case No. CV-92-183-FR). We have also considered the motion filed in the United States Bankruptcy Court for the District of Oregon captioned In re Robert Myers, Trustee, Misc. Proceeding No. 392-304-H.

This will also apprise you of the fact that the Program has recently adopted a statement of position with regards to the reimbursement of expenses related to employment discrimination claims. See attached memorandum dated July 10, 1992. The position enunciated there also guides our determination in Mr. Myers' case.

The overall position of the United States Trustee Program as well as the decision in response to Mr. Myers' request were not easily reached, and the Program had to consider a variety of

¹The letter was incorrectly dated May instead of March.

Paul S. Cosgrove, Esq. - 2

factors. Ultimately, the decision in Mr. Myers' case is based on the considerations set forth in the policy statement as well as such additional considerations as are set forth in this letter.

We realize an underlying premise of the standing trustee concept is that the costs of administration are distributed across all cases. That expenses can be distributed across all cases, however, does not mean that any expense can be so distributed. More importantly, the presence of substantial monies in the trust fund does not alter or lend support to a more expansive interpretation of what constitute "actual, necessary" expenses under 28 U.S.C. § 586(e).

The monies held in trust by a standing trustee are separate and distinct from the standing trustee. The standing trustee is a fiduciary responsible for the trust funds. The trust does not carry out the duties set forth in the Bankruptcy Code, the standing trustee does. In this sense, individuals assisting the standing trustee are employees not of the trust, but of the standing trustee. Their responsibilities, working hours, conditions, and salary, none of which are unique to the administration of bankruptcy cases, are determined by the standing trustee, as employer. Their relationship is with the standing trustee, not the trust. Any allegations of discriminatory conduct arising in that employment relationship exceeds the bounds of the trustee's primary duty, which is to administer bankruptcy cases, and trust funds should not be expended to relieve an employer of personal liability for such conduct. To hold otherwise would render the trust funds an overall insurance policy for discriminatory conduct by standing trustees, contrary to the trustees' fiduciary duties and contrary public policy.

With regard to the United States Trustee's demand for payment of surplus, Mr. Myers' audited annual report for fiscal years ending September 30, 1991 and 1990 reflected a total surplus of \$146,530. Pursuant to Program policy, he was allowed to carry forward surplus to the extent it did not exceed 25% of his actual necessary expenses for FY 1991. In Mr. Myers' circumstance, this resulted in \$132,848 of the total surplus which could be carried forward. The difference of \$13,682 was to be turned over to the United States Trustee unless Mr. Myers agreed to reduce his percentage fee for the benefit of debtors and creditors. If he did so, then Mr. Myers could retain surplus above and beyond the 25% level for purposes of paying actual, necessary expenses. At this juncture, Mr. Myers has not reduced his percentage fee, therefore, surplus in the amount of \$13,682 remains payable to the United States Trustee.

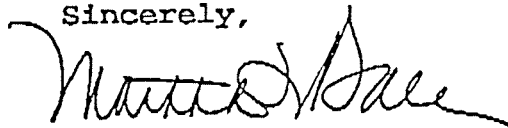
It was unclear from the motion you filed on behalf of Mr. Myers whether the entire surplus or simply the portion above 25%

Paul S. Cosgrove, Esq. - 3

was at issue. After reviewing the Assistant United States Trustee's letter (Exhibit A to your motion), I wanted to clarify that our request for turnover pertained to the \$13,682 amount. Although the policy statement does not deal directly with the use of surplus funds, in keeping with the statement, we cannot allow payment of the defense costs from surplus funds. As you know, surplus is ultimately payable to the United States Trustee for deposit in the United States Trustee System Fund under 28 U.S.C. § 586(e)(2)(B).

Please feel free to contact me in writing if you have any questions regarding this matter.

Sincerely,



Martha L. Davis
General Counsel

Enclosure

cc: Mary Jo Heston
United States Trustee
Region 18



U.S. Department of Justice

Executive Office for United States Trustees

Office of the Director

Washington, D.C. 20530

July 10, 1992

MEMORANDUM

TO: All United States Trustees

FROM: *MD* Martha L. Davis
General Counsel

SUBJECT: Payment of Employment Discrimination
Claims from Standing Trustee Trust Accounts

This memorandum addresses the question of whether an award for damages for employment discrimination, as well as the attorney fees associated with defending such a lawsuit, may be paid from trust funds^{1/} held by a standing chapter 13 trustee. An ancillary question is whether these monies may be used for a settlement of such an action. Our view is that chapter 13 trust funds may not be used for such purposes.

The response to the question presented must be drawn from the statutory language regarding the administration of bankruptcy estates. The protections and obligations of the debtor, the responsibilities of private trustees and government agencies, and the substantive law the court must interpret, are premised on the law enacted by Congress. Any review must be limited to what the law states and to authority that lends to the interpretation of the language. U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1025, 1030 (1989). A statute must "be interpreted to avoid untenable distinctions and reasonable results," American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1991).

^{1/} Trust funds are defined to include the monies maintained in the pre-confirmation account, expense account and confirmation account of the standing trustee.

STATUTORY FRAMEWORK

Under chapter 13 of the Bankruptcy Code, 11 U.S.C. 1301 et seq., subsequent to filing a petition, a debtor^{2/} proposes to the court a plan to repay all or part of his debts. Payments by debtors are made to the standing trustee. The standing trustee is appointed by the United States Trustee to administer all chapter 13 cases in a particular geographic area. 28 U.S.C. 586(b).

Through the payments made by the debtor, a trust is established. The trust's beneficiaries, the creditors, receive the monies in the trust in accordance with the repayment plans approved by the court. The standing trustee, as fiduciary for the trust, collects the monies, ensures the safe keeping of the trust fund, makes disbursements to the beneficiaries, and performs the duties set forth at 11 U.S.C. 1302(b). The standing trustee receives compensation and expenses from the trust at levels determined by the Attorney General.^{3/}

Section 586(e)(1) of title 28, U.S.C., authorizes the Attorney General to establish a percentage fee to be assessed against payments made to the standing trustee by debtors. The fee has two purposes: to compensate the standing trustee and to provide for the "actual, necessary expenses" incurred in administering chapter 13 bankruptcy estates. By fixing the percentage fee to be assessed, the amount of monies a standing trustee receives for compensation and expenses is determined.

The extent of expenses the standing trustee may receive is governed by the "actual, necessary" language of § 586(e)(1) and § 586(e)(2)(B)(ii). The language itself is that of limitation. Instead of simply authorizing the payment of "expenses" from the trust, the law requires that they be "actual and necessary." Moreover, the compensation and expenses incurred must relate to efforts associated with the actual administration of estates. Section 586(e)(2)(B), which addresses circumstances when the fees collected exceed

^{2/} Under the terms of 11 U.S.C. 109(e), only debtors with unsecured debts of less than \$100,000, and secured debts of less than \$350,000 are eligible under the provisions of chapter 13 of the Bankruptcy Code.

^{3/} By delegation from the Attorney General, the Director, Executive Office for United States Trustees, has responsibility to establish the level of compensation and expenses.

compensation and expenses, makes this clear by limiting "actual, necessary expenses" to those costs "incurred by . . . (the) standing trustee in such cases" that he administers. Section 586(e)(1)(B)(i), in establishing a ceiling of 10% for the total compensation and expenses, further indicates the confined nature of the expenses that may be received.

In view of the statutory language describing the type of expenses, and requiring expenses to relate directly to the administration of cases, we conclude that trust monies may not be used to pay or settle employment discrimination claims. As set forth below, the statutory language reflects important policies that demand such a view.

CASE LAW

That expenses are confined to those directly related to administering estates is reflected in the case law. The language of § 586(e) is consistent with 11 U.S.C. § 330(a)(2), which allows professionals and trustees to seek "reimbursement for the actual, necessary expenses" in chapter 7 and chapter 11 cases. Although the cases are not totally uniform, courts generally allow reimbursement for expenses incurred to render benefit to a specific case. See e.g., In re Bible Deliverance Evangelistic Church, 39 B.R. 768 (Bankr. E.D. Pa. 1984) (filing fees, witness fees and transcription expenses allowed); In re S.T.N. Enterprises, 70 B.R. 823 (Bankr. D. Vt. 1987) (extraordinary postage expenses allowed). The tenor of the case law reflects a restrictive rather than expansive view of "actual, necessary" expenses.

While it is clear that chapter 7 and chapter 11 case law construing § 330(b) provides no support for the payment of employment discrimination actions, the parallels to chapter 13 are difficult. Chapters 7 and 11 case law is premised on the concept of expenses benefitting a particular estate. The task of quantifying benefit is virtually impossible in chapter 13 cases. The underlying premise of the standing trustee is that the costs of administration are distributed across all cases. In re Savage, 67 B.R. 700, 707 (D.R.I. 1986). That expenses are spread across all cases does not mean that any expense can be so distributed, however. More importantly, the presence of substantial monies in the trust fund does not alter or give support to a more expansive perspective of what constitutes an "actual, necessary" expense.

STANDING TRUSTEE AS A FIDUCIARY

The statutory limitation on expenses that can be paid from trust funds emanates from the fiduciary nature of the standing trustee's responsibility. The funds available to pay the trustee's compensation and expenses flow from plan payments. The funds never lose their status of trust monies until paid. Monies collected and deposited into the "expense trust account" are in the custody of the standing trustee, but do not constitute property of the standing trustee, except to the degree that accrued compensation has remained in the trust account. A creditor of the trustee may have an equitable remedy to proceed directly against the trust, but only to the extent that the trustee has an interest, such as accrued compensation. See, United States v. Safeco Insurance Co., 870 F.2d 338 (6th Cir. 1989).

The appointment of a standing trustee states that upon death or termination of the standing trustee "neither he nor his heirs, administrators or assigns . . . shall have any expense right, claim, title or demand upon any commissions or expenses." If the trustee ceases to remain in office, neither he nor his estate has any claim to compensation or expenses that accrue thereafter. The expense trust account transfers from successor to successor and ensures continuity in plan administration as it is available to pay the successor's compensation and expenses. See, Flournov v. Hershner, 68 B.R. 165, 169 (M.D. Ga. 1986). See also, United States v. Safeco Insurance Company of America, 870 F.2d 338 (6th Cir. 1989) (creditor of standing trustee entitled to only that amount which represented compensation for period which standing trustee worked and not the entire amount collected by way of the percentage fee).

Trust monies are separate and distinct from the standing trustee. The law is emphatic in distinguishing the actions of a trustee and liability that may be incurred, from that which accrues to the trust. Trust monies do not exist to serve the trustee. "Where the trustee is negligent or willful and fails to meet the standard of care required of him, he is liable for loss. . . . It is not necessary to a surcharge of a trustee's accounts that he shall have been guilty of fraud or intentional wrongdoing. It is sufficient that the trustee has failed to discharge a duty required by the law." In re Johnson, 518 F.2d 246, 251 (10th Cir.), cert. denied, 423 U.S. 893 (1975).

To one degree or another the law has always held the trustee accountable and personally responsible for the administration of the trust, even though under terms of the trust, the trustee may be entitled to reimbursement for actual,

necessary expenses. See, In re Gorski, 766 F.2d 723, 726 (2d Cir. 1985). Thus, for example, when a trustee is authorized to incur an expense, he maintains a duty to exercise reasonable care as a ordinary, prudent man not to incur a greater expense than is reasonable under the circumstances. Restatement (Second) of Trusts, § 246. The law's historical perspective has been to protect the trust corpus, even at the risk of exposing the trustee to liability. Our conclusion that employment discrimination claims are not "actual, necessary expenses" is consistent with this perspective.

ROLE OF THE STANDING TRUSTEE

Beyond the statutory restriction that is founded on the fiduciary nature of the standing trustee's responsibilities is the character of the standing trustee's relationship to the system as a whole. The standing trustee is not an employee of the United States. See, e.g., Wells v. United States, 98 B.R. 806 (N.D. Ill. 1989); Southern Tier Energy Products, Inc., 109 B.R. 96 (Bankr. M.D. Penn. 1989); Kuchan v. Heston, No. 91-5465(T) (W.D. Wash., May 5, 1992). The status is more akin to that of an independent contractor. Matter of Chapter 13, Pending and Future Cases, 19 B.R. 713, 716 (Bankr. W.D. Wa. 1982). The standing trustee is obligated to administer chapter 13 cases consistent with the duties set forth in 11 U.S.C. 1302. While other laws impose obligations and responsibilities on the public in general, and therefore on the standing trustee, the Bankruptcy Code does not delineate specific efforts the standing trustee must undertake. Subject to overall efficiency and effectiveness standards, standing trustees are afforded wide discretion in carrying out their responsibilities.

As stated, the standing trustee is the fiduciary responsible for the trust funds. The trust does not ~~carry out~~ the Code's responsibilities, the standing trustee does. In this sense, individuals assisting the standing trustee are employees not of the trust, but of the standing trustee. Their responsibilities, working hours, conditions, and salary, none of which are unique to the administration of bankruptcy cases, are determined by the standing trustee, as employer. The relationship is with the standing trustee, not the trust. Whether involving the payment of employment taxes, adhering to standards required for a safe working environment, conforming to minimum wage and hour laws, or complying with the laws regarding equal employment opportunity, any dispute is with the standing trustee. Any remedy must come from the standing trustee, not the trust fund.

EQUAL EMPLOYMENT OPPORTUNITY LAWS

Beyond the statutory language, the inherent limitations on a fiduciary's use of trust funds, and the role of the standing trustee as an independent contractor, is the public policy at stake in the laws pertaining to equal employment. Congress has made clear the responsibilities employers have in ensuring an environment where fairness and equal opportunity pervade. See, e.g., Civil Rights Act of 1964, title VII, 42 U.S.C. 2000e;; Equal Pay Act of 1963, 29 U.S.C. 206; and Age Discrimination in Employment Act of 1967, 29 U.S.C. 621. Similar statutes have been enacted by the states.

A standing trustee's obligation in this area is clear. Beyond federal and state fair employment laws, the qualifications required by the United States Trustee Program set forth in 28 C.F.R. § 58.3(b)(4) demand standing trustees to be free of prejudice or bias. Similarly, the Program's Handbook for Chapter 13 Standing Trustees admonishes trustees to engage in nondiscriminatory employment practices. Engaging in discriminatory conduct is far outside any parameters of administering bankruptcy cases. Trust funds should not be expended to relieve an employer of the liability. To hold otherwise would render the trust funds an overall insurance policy for any action of the standing trustee.

STANDING TRUSTEE AS COMPARED TO PRIVATE ENTERPRISE

We realize that the premise of this memorandum disrupts the expectations of those who believe that "actual, necessary expenses" should be given a broad expanse. Certainly, in administering thousands of bankruptcy cases, the standing trustee encounters a range of circumstances. The standing trustee has attributes of a business endeavor, including being subject to frivolous lawsuits. What is accorded a normal expense in a business environment, however, does not necessarily follow in the standing trustee context. The standing trustee is distinguished in several respects. A normal business entity does not have its compensation and expenses established by a regulatory agency. Its overall cost and ability to remain viable is dependent on the market place.

Additionally, it may be that the risks of financial exposure is greater for the standing trustee as compared to traditional corporate structure's protection of its principals. We are well aware that the burden of lawsuits, particularly frivolous ones, falls on the standing trustee as an individual and that elements of unfairness flow from this result. That varied risks and exposure accrue to different entities is a

result of the structure created by the law. The law, in establishing the compensation standing trustees may receive as well as the expenses that will be allowed, has allocated risk and the exposure to liability.

SUMMARY

In summary, we are of the view that the statutory language itself, the historic limitation on a fiduciary's access to trust funds, the distinction between the trust fund and the standing trustee's actions, and the important public policy found in the equal employment laws, lead to the conclusion that chapter 13 trust funds cannot be used to pay employment discrimination claims. For these same reasons, we do not think that trust funds may be used for the defense of such actions. For trust monies to be expended to settle or pay a discrimination suit against the standing trustee crosses the line from an expenditure in fulfillment of the trust's purpose to an expenditure for the standing trustee as individual. We do not think that the Congress, in enacting 28 U.S.C. 586, envisioned such a possibility.